IN THE

Supreme Court of the United States

No. 814

DAVID W. ONAN, C. WARREN ONAN AND ROBERT D. ONAN, GENERAL PARTNERS DOING BUSINESS AS D. W. ONAN & SONS, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INDEX

CASES CITED

STATUTES CITED

IN THE

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No. .....

DAVID W. ONAN, C. WARREN ONAN AND ROBERT D. ONAN, GENERAL PARTNERS DOING BUSINESS AS D. W. ONAN & SONS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Justices of the Supreme Court of the United States:

The petition of David W. Onan, C. Warren Onan and Robert D. Onan, general partners doing business as D. W. Onan & Sons, petitioner in the above captioned case, respectfully shows:

STATEMENT OF THE MATTER INVOLVED

The Business of the Petitioner.

The petitioner, D. W. Onan & Sons, is a limited partnership engaged in the business of the manufacture, sale and distribution of electrical power plants and equipment. It operates three plants in Minneapolis, Minnesota, employing approximately 2,000 persons.

Proceedings Before the National Labor Relations Board Under Section 9 of the National Labor Relations Act.

Section 9 (c) of the National Labor Relations Act (Act of July 5, 1935), 49 Stat. 449, 29 U. S. C., *et seq.*, provides:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

Proceedings under this section (Section 9) of the Act are known as representation proceedings, and hereinafter referred to as such.

Local 1139, United Electrical Radio and Machine Workers of America, C. I. O., petitioned the National Labor Relations Board for representation of the employees of your petitioner. The National Labor Relations Board conducted a hearing on said petition and on October 15, 1943, the National Labor Relations Board issued its Decision and Direction of Election in the following words:

> "By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act and pursuant to Article III, Section 9 of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby directed that, * * * an election by secret ballot shall be conducted as early as possible, * * * etc."

The election above ordered was duly held. The union lost the election 943 votes to 530 votes. Subsequently thereto proceedings were commenced under Section 10 of the National Labor Relations Act.

Proceedings Under Section 10 of the National Labor Relations Act.

Section 10 (b) of the National Labor Relations Act provides:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purpose, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than 5 days after the serving of said complaint."

Under said Section 10 (b) of the Act the union filed two sets of charges in its complaints against the petitioner; the charges in said complaints allege the commissions of unfair labor practices. Said charges are identical and were recognized as such by the National Labor Relations Board. (See Petitioner's Exhibit D.)

Upon the filing of the two sets of charges against your petitioner the Board filed one set of charges in Case No. 18-R-822, which was the file number in the original representation proceedings under which the direction of election was filed. The other set of charges was given a new number, namely, 18-C-998. On January 1, 1944, the Board entered its order directing a hearing on both sets of charges, the said direction bearing both case numbers, and issued its order consolidating the cases. (See Petitioner's Exhibit C-1.) Thereafter, without notice, on January 20th there was issued an order by the Board severing the two cases. (See Petitioner's Exhibit C-2.) Thereafter, pursuant to Section 10 (c) of the Act, additional hearings were had upon the charges filed by the union against the petitioner but in the proceedings bearing Case No. 18-R-822. Section 10 (c) of the Act provides:

> "The testimony taken by such member, agent, or agency of a Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the purposes of this Act."

After said hearings before the National Labor Relations Board, the Board then on July 5, 1944, issued its Supplemental Decision and Order, providing:

> "We find the company's above described course of conduct during the period preceding the election prevented an expression by the employees therein of their free and uncoerced wishes as to representation."

This is practically the same wording as is in Section 10 (b) of the Act.

Upon these findings the Board set aside the previously held election and stated:

> "It is hereby ordered that the election held on November 3, 1943, among the employees of David W. Onan, C. Warren Onan and Robert D. Onan, partners, d/b/a D. W. Onan & Sons, Minneapolis, Minnesota, be and it hereby is set aside."

Proceedings Subsequent to Supplemental Decision and Order of the Board.

Your petitioner therefore sought to have reviewed by the Circuit Court of Appeals for the Eighth Circuit the said Supplemental Decision and Order, pursuant to Section 10 (f) of the Act. Section 10 (f) of the National Labor Relations Act provides:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals in the United States."

Your petitioner is a person aggrieved by the Supplemental Decision and Order of said National Labor Relations Board. Said Order is final.

The National Labor Relations Board moved to dismiss the petitioner's petition for review of the Supplemental Decision and Order upon the ground that the proceeding before the Board was a representation proceeding pursuant to Section 9 of the National Labor Relations Act, and that no order in an unfair labor practice proceeding is based in whole or in part upon the representation proceeding; that the Circuit Court of Appeals was therefore without jurisdiction to review the proceeding. (See Board's Motion to Dismiss.)

The Circuit Court of Appeals granted the motion of the National Labor Relations Board to dismiss petitioner's petition for review. (See Decision of Circuit Court of Appeals.)

JURISDICTION

1. The date of the decision, order and adjudication of the Circuit Court of Appeals for the Eighth Circuit was October 5, 1944.

2. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925.

3. The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law which has not been but should be settled by this Court.

4. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

5. The matter involved is one of great national interest.

QUESTIONS PRESENTED

The following questions are presented:

1. Whether the Supplemental Decision and Order of the National Labor Relations Board predicated on a finding of unfair labor practices and setting aside an election on those grounds is a final order and therefore appealable under Section 10 (f) of the Act.

2. Whether the National Labor Relations Board can arbitrarily conduct its proceedings simultaneously under Sections 9 and 10 of the Act concerning wholly the question of unfair labor practices, consolidate said proceedings, then sever them, and issue its Decision and Order ostensibly under Section 9 of the Act and thereby accomplish what it could not otherwise accomplish, namely, prevent what would otherwise be appealable, a review on the merits of the case by the Circuit Court of Appeals of the only issue involved, in contravention of Section 10 (f) of the Act.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be decided by this Court.

(a) In no case heretofore decided has the question arisen of whether an order predicated upon findings of unfair labor practices under consolidated proceedings under both Sections 9 and 10 of the Act is a final order and therefore appealable. In cases heretofore decided by this Court in connection with proceedings consolidated under Sections 9 and 10, the question of whether there has been a violation of the Act has not been the sole issue, or it has not been a final order issued in connection therewith by the National Labor Relations Board.

(b) This Court has not heretofore been called upon

to determine whether or not the National Labor Relations Board can, in consolidated proceedings, where the only question involved is one of violation of the Act, properly sever its proceedings subsequently to defeat an appeal based upon the merits, where no issue pertaining to the representation proceedings is involved.

These matters are of great concern to the petitioner and to all other persons who subsequently may be held to be violators of the Act in proceedings under Section 10 and through the arbitrary action of the National Labor Relations Board, be deprived of the right of review.

(c) The Order sought to be appealed from is final, in that the only way the Order setting aside the election can itself be set aside would be upon a finding that the petitioner was not guilty of the unfair labor practices complained of.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

This Court has repeatedly used language in various of its decisions indicating that review will lie when the Board issues an order requiring the employer to do something predicated upon the result of an election.

Despite the fact that an election was held and hence representation proceedings had terminated, the Circuit Court of Appeals ignored that fact when it dismissed the petition. It also ignored the fact, that the only question here involved is one involving alleged violations of the Act—completely disassociated from representation proceedings. Such a holding is contrary to both the meaning and intent of the Act and other applicable decisions of this Court.

The Circuit Court of Appeals has further failed to distinguish between cases involving administrative orders, such as:

1. An order of the Board determining or nominating the choice of the collective bargaining agent.

2. An order of the Board determining a pre-election matter.

3. An order of the Board predicated upon or involving other administrative or ministerial functions,

as differentiated from orders predicated upon findings of violation of the Act, such as:

1. An order of the Board (after all ministerial or administrative functions have been done) setting aside an election already held.

Such a decision by the Circuit Court of Appeals ignores the plain language used by this Court in those cases where this Court has been called upon to determine the right of review of various types of orders of the Board.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a transcript of the Record in proceedings herein; that the Circuit Court of Appeals be directed to review the decision of the National Labor Relations Board in its findings relative to whether or not the petitioner has been guilty of alleged unfair labor practices, upon which said Supplemental Decision and Order was predicated, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem mete and just.

Respectfully submitted,

R. H. Fryberger and
G. W. Townsend,
Attorneys for Petitioner,
1126 Baker Building,
Minneapolis, Minnesota.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

For the statement of the case and the grounds upon which the jurisdiction of this Court is invoked reference is made to the preceding petition. The Eighth Circuit Court of Appeals erred in dismissing petitioner's petition for review, for the reasons set forth in the preceding petition.

I.

THE BOARD'S SUPPLEMENTAL DECISION AND ORDER PERTAINS SOLELY TO ALLEGED UNFAIR LABOR PRACTICES; IS THEREFORE PURSUANT TO SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT; IS A FINAL ORDER AND THEREBY APPEALABLE

To adequately understand petitioner's position we believe it significant and controlling to point out here that the "charges" so made by the union in its "protest of election" are vastly different from the "protest" or "charges" made in all other types of cases where the question of jurisdiction for review has arisen and upon which the Board relied in its motion to dismiss. We believe that in no other case heretofore decided has a similar question to that which is here presented, been submitted to the courts. A review of those cases heretofore decided enables us to classify matters heretofore adjudicated generally in the following manner:

1. Claims or charges by a union that the Board had erred in the exercise of its administrative or ministerial judgment, by

(a) The determination of the choice of the collective bargaining agent (*A. F. L. vs. N. L. R. B., post; Union Premier Food Stores vs. Retail Food*

Clerks & Managers Union (C. C. A., Pa., 1938), 98 Fed. (2d) 821; *Fur Workers Union, Local No. 72 vs. Fur Workers Union No. 21238*, 105 Fed (2d) 1, certiorari granted 60 S. Ct. 78, 308 U. S. 537, affirmed 60 S. Ct. 292, 306 U. S. 522).

(b) The determination of a pre-election matter under Section 9 (d) of the Act (*N. L. R. B. vs. Falk Corporation, post*).

2. An order of the Board in a simple representation proceedings predicated upon an administrative or ministerial function (*Cupples Company Manufacturers vs. N. L. R. B., post*), contested by either the company or the union where the question of violation of the Act is not at issue (E. I. Dupont DeNemours, *post*).

The charge of the union was that the company *violated the Act*. This could mean only that the violation by the company was with respect to Section 10 of the Act. So far as Section 10 is concerned it can make no difference in its effect whether the charge had to do with violations in connection with a previous election or any other type of violation; in either event it was a charge of unfair labor practice. In fact, neither the charge nor the Supplemental Decision and Order of July 5, 1944, limits the alleged violations to the actual conduct of the election itself. They both represent and specify that the election was *lost* because the company violated the Act, but the alleged violations all are said to have occurred prior to the election, which makes the election only an incident following the course of conduct complained of.

The Supplemental Decision and Order provides:

> "We find the company's above described course of conduct *during the period preceding the election* prevented an expression by the employees therein of their free and uncoerced wishes as to representation." (Italics ours.)

Thus, it is the "course of conduct" of the company preced-

ing the election which is held to be a violation of the Act, without which findings none of these issues would now be presented. The proof thereof lies in the Board's very next sentence, which states: "We shall *therefore* set the election aside."

It is the position of the petitioner that nothing more final could have been issued by the Board than its Order pursuant to the foregoing, which reads:

> "It is hereby ordered that the election held on November 3, 1943, among the employees of David W. Onan, C. Warren Onan and Robert D. Onan, partners, d/b/a D. W. Onan & Sons, Minneapolis, Minnesota, be and it hereby is set aside."

Therefore, the only question before this Court is not whether the Board has committed error in the exercise of its administrative functions and duties pertaining to a representation proceedings under Section 9 (c) of the Act, but whether or not the company is guilty of unfair labor practices under Section 10 of the Act.

A. The Board by Its Joinder and Severance of Cases Cannot Arbitrarily Control the Matter at Issue and Thereby Deny to Petitioner Its Right of Review.

The union filed two sets of charges. It is evident that the charges contained in the two sets were identical as appears from the letter of Regional Director Schields of December 2, 1943. He states in that letter: "In the meantime I would be glad if you would state your position with reference to the allegations of the charge, *which are the same as the allegations made in the Protest of Election.*" (Italics ours.)

When the two sets of charges were filed, the Board entered a new case number, namely, Case No. 18-C-998 for one set of charges, and filed the other in Case No. 18-R-822, which was the representation proceedings. Under date of January

1, 1944, the Board then entered its Order directing hearing on both sets of charges, and entitled the notice in both numbered cases. It was evident, therefore, that not only Regional Director Schields, but Mr. Lawyer, Chief of the Order Section of the Board, considered the charges *identical* and that they should be heard in one proceeding.

However, without notice, and without any apparent reason for so doing, Mr. Mantel, Acting Chief of the Order Section of the Board, entered an order on January 20, 1944, severing the two cases. The reason for making this severance was that the Board had considered and deemed it necessary so to do "in order to effectuate the purposes of the Act." It is quite inconceivable how the purposes of the Act could be effectuated by a severance of the two cases, since they were based on identical charges.

In the order *consolidating* the cases identically the same words were used, namely, that the Board deemed it "necessary (to consolidate them) in order to effectuate the purposes of the Act." We have then on January 1, 1944, the necessity of consolidating the cases to effectuate the purposes of the Act and (20 days later) on January 20, 1944, the necessity of severing them in order to accomplish the same purpose. It is a fact that no additional charges had been filed in the meantime and the two Orders were predicated on the same existing facts.

The hearing upon which the Supplemental Decision and Order was entered happens to carry the same number as the representation proceedings, namely, Case No. 18-R-822. The *numbering* on the case cannot be made controlling on the right of review of the Supplemental Decision and Order, if, as has already been pointed out, the matter before the Board at the hearing was a charge of unfair labor practice and not a charge that error had been committed in the representation proceedings. In other words, the turn of the wrist and

the scratch of the pen of the Board cannot be permitted to deprive a party adversely affected by the Supplemental Decision and Order from his right of review by this Court.

II.

APPLICABLE LAW DISTINGUISHES BETWEEN ADMINISTRATIVE ORDERS UNDER SECTION 9 AND ORDERS PREDICATED UPON FINDINGS UNDER SECTION 10

The case of *American Federation of Labor vs. National Labor Relations Board*, 308 U. S. 401, came up on petition for writ of certiorari to review a judgment dismissing for want of jurisdiction a petition to review the certification by the National Labor Relations Board of an organization of longshoremen as representative of workers. The Court said:

> "The question decisive of the case is whether a certification by the National Labor Relations Board under Sec. 9 (c) of the Wagner Act, 49 Stat. 449, 453, 29 U. S. C., Supp. IV, Secs. 151-166, that a particular labor organization of longshore workers is the collective bargaining representative of the employees in a designated unit * * * is reviewable by the Court of Appeals for the District of Columbia by the procedure set up in Sec. 10 (f) of the Act."

The Court of Appeals dismissed the petition as not within the jurisdiction to review orders of the Board conferred upon it by Section 10 of the Wagner Act. Affirmed.

The question, therefore, of whether an order may be reviewable by appeal to the courts *after* administrative duties and functions of the Board has *ceased* and a decision and order is made predicated upon a *violation* of the National Labor Relations Act, does not even arise in that case. There was no claim, in that case, of a violation of the *Act* by *any* party—merely a claim that the Board had erred in exercising its administrative or ministerial judgment. It is exactly

analogous to those cases whereby a municipal governing body, in the exercise of its administrative duties, decides a matter *one* way when it could have, in the exercise of its judgment or discretion, decided another way. Such administrative *decisions* cannot be attacked. However, where the same body takes action, either affirmatively or negatively, predicated upon and *charging* violation of a *law, that* action is reviewable.

If this were not so, and if it is not so here, then there is no guarantee against arbitrary action by the Board. Then the Board itself becomes not an administrative, ministerial or fact finding body—but a combination of these and a court. That Congress, in passing the Act, had no such purpose in mind, appears obvious, and we quote from a note at page 410 of the above cited case.

> "There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an *Order* predicated upon the election, such an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by an aggrieved party in the Federal Courts in the manner provided in Sec. 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board."
>
> Sen. Rep. 573, *Committee on Education and Labor*, 74th Cong., 1st Sess., p. 14.

In the case at bar the Board has gone one step further than it did in the American Federation of Labor case just cited. It has issued an order which is final, and which is the *last* act it could do. Whereas, in the American Federation of Labor case it had not as yet taken its final step. Had it done so, it is obvious that the order would then have been reviewable.

A. There Is No Conflict Between Cases Cited by the Board and Petitioner's Position. The Test Is Whether or Not There Has Been Issued an Order Predicated Upon the Results of an Election.

The case of *National Labor Relations Board vs. Independent Brotherhood of Electrical Workers*, 308 U. S. 413, is a companion case to that of the *American Federation of Labor vs. National Labor Relations Board, supra*. In the last cited case the question was whether a direction for an election made by the National Labor Relations Board in a representation proceedings under Section 9 (c) of the Wagner Act is reviewable by a Circuit Court of Appeals. Held: Not reviewable.

Distinguishment between this case and that at bar is exceedingly simple. In the cited case the Board had merely issued its "direction" for a run-off election, stating that in its opinion the question of representation (between competing unions) could best be solved in that manner. Such a "direction" is obviously not reviewable. The only question for review in the cited case is whether the Board has correctly exercised its administrative duties in selecting the correct union to be voted upon in the election *to be held* as a result of the Board's "direction of election." In the case at bar the election had been held. The petitioner's contention is—not that the Board has made an erroneous choice of administrative options—but that there has been no violation of the Act.

The case of *National Labor Relations Board vs. Falk Corp.*, 308 U. S. 453, was a case wherein, in consolidated proceedings against an employer under the National Labor Relations Act, the Board, under Section 10 (c), ordered the employer to cease and desist from interference with and domination of a labor union of its employees, to completely disestablish such union, and to post notices of compliance

with the Board's order; and, under Section 9 (c), directed an election of a representative for collective bargaining on a ballot containing the names of two competing unions but omitting the company union. The Circuit Court of Appeals granted enforcement, providing that the employees should be free at any election to choose the company union to represent them, and that the employer be permitted to add to the posted notices the qualifications that the company union would be disestablished and unrecognized until and unless it should be chosen by the employees to represent them.

Held: The Circuit Court of Appeals was without power thus to modify, and was without jurisdiction under Section 9 (d) to review the Board's direction of an election.

This case is easily distinguishable from the one at bar by the language of the Court itself at page 459:

> "Here, the Board's order that the employer cease its unfair practices, disestablish the company union and post notices was not 'based in whole or in part upon facts certified' as the result of an election or investigation made by the Board pursuant to Sec. 9 (c). The proposed election here has not even been held and consequently no certification of a proper bargaining agent has been made by the Board. Until that election is held, there can be no certification of a bargaining representative and no Board order—based on a certification—has been or can be made, so as to invoke the court's powers under 9 (d).
>
> "The fundamental error of the court below lay in its assumption that there was before it 'for final disposition, the matter of the selection of the bargaining agent.' The court has no right to review a proposed election and in effect to supervise the manner in which it shall thereafter be conducted. There can be no court review under 9 (d) until the Board issues an order and requires the employer to do something predicated upon the result of an election.
>
> "Since this employer has not been ordered by the Board to do anything predicated upon the results of an election the court had no authority to act under 9 (d)."

But in addition to these words of the Court it is significant to note, that the only question in controversy has to do with Section 9 (d) and not, as in the case at bar, with Section 10.

In *Cupples Co. Mfgrs. vs. National Labor Relations Board*, 106 Fed. (2d) 100, there was no connection between the principles there involved and that at bar. In fact, the Court states at page 104:

> "There are no questions growing out of the representation cases now before us for review, for the reason that the Board has made no final order with respect to representation in the match department."

These were simply proceedings by the company to review and set aside an order of the National Labor Relations Board, which order was vacated in part and affirmed in part. The question of the jurisdiction of the Court was not even raised.

E. I. DuPont de Nemours & Co. vs. National Labor Relations Board, 116 Fed. (2d) 388, came up on petition to review and set aside an order of the Board and to review a direction of election issued by the Board. While holding the Order of the Board reviewable, and reviewing it, and refusing to review the direction of election, the Court said, as it did in the other cases cited:

> "A Circuit Court of Appeals has no right to review a *proposed* election and in effect to supervise the manner in which it shall thereafter be conducted."

Nevertheless, the Court did review the Order of the Board, which Order *charged* violations of the Act.

Inland Container Corp. vs. National Labor Relations Board, 137 Fed. (2d) 642, distinguishes itself very readily from the case at bar, and may be disposed of by these words of the Court at page 643:

> "The only question here is whether this court has jurisdiction to order additional evidence to be taken in a Labor Board proceeding in which the only action taken

> by the Board is the direction of an election. We think it has not."

The Court, however, in distinguishing the two principal functions of the Board says:

> "Only under Sec. 10 may application be made to the Circuit Court of Appeals: under subsec. (e) by the Board for enforcement of an order involving an unfair labor practice; and under subsec. (f) by an aggrieved person for review of such an order. No provision is made for review by the Circuit Court of Appeals of proceedings under Sec. 9, except where the results of an investigation under Sec. 9, in whole or in part form the basis for an order of the Board involving an unfair labor practice under Sec. 10."

The distinguishing feature of Inland Container Corp., *supra*, is that the proceedings were solely on a petition for leave to adduce certain evidence excluded by the trial examiner. In other words, the proceedings themselves were not complete, there had been no certification, but, most important, no order of any kind, final or otherwise, had as yet been made by the Board. Whereas, in the case at bar everything had been completed and a final order had been made.

In *Wilson & Co. vs. National Labor Relations Board*, 120 Fed. (2d) 913, 915, the *facts* differ from the facts of the case at bar. There, charges were filed by the union upon which complaint issued, predicated upon Section 10 of the Act. In the meantime, a separate representation proceedings was filed by the union under Section 9, and consolidated by Order of the Board. This resulted in a direction that an election be held. In the petition for review, petitioner sought to review and set aside the direction of election. *But—there had been no previous decision and Order by the Board predicated upon an election held and that there had been unfair labor practices indulged in by the company, as is the situation in the case at bar. The entire basis of the* Supplemental

Decision and Order in the case at bar is that there have been unfair labor practices indulged in.

In *Bethlehem Shipbuilding Corp. vs. National Labor Relations Board*, 114 Fed. (2d) 930, 935, as in the foregoing case, the procedural facts differ from the case at bar and the case is not in point. There, the petitioners asked for a review of the complaint case and of a review of the petitions filed by the union under Section 9 of the Act asking for certification of collective bargaining representatives. While the petition for review as to the charges filed under Section 9 were denied on the same grounds as in the cases cited, *supra*, an election had not been held, nor order made upon said election as in the case at bar.

Utah Copper Co. vs. National Labor Relations Board, 136 Fed. (2d) 485, is also reconcilable on the same grounds as the other cases cited. Moreover, the Court stated:

> "This court cannot review an order directing an election nor a certification of the bargaining representative. There can be no court review under Sec. 10 (f) until the Board issues an order and requires the employer to do something predicated upon the result of an election."

A fortiori—if the Board issues an order requiring the employer to do something predicated upon the result of an election, it is reviewable. In the case at bar an election was held. The union lost. It filed charges of violation of the Act. Hearings were had. The Board decreed the result of the election was influenced by violations of the Act antedating the election. The Board determined that the company had violated the Act. The Board determined that the violations had affected the result of an election. A new election is ordered as a result of the alleged violation. The National Labor Relations Board now says "no order of any kind has been directed against petitioners requiring them to do anything." If this were so, the company could ignore the Order

and refuse to hold the requested election. But if it does, proceedings may be taken to adjudge petitioner in contempt. We find no case that holds with the Board's curious contention, nor sustains the Circuit Court of Appeals in its judgment of dismissal.

Millis vs. Inland Empire District Council, 14 L. R. R. 711, is not in point, even with the preceding cases. The only point involved was whether or not there could be a judicial review of the Board's certification, following an election, of the collective bargaining representatives of certain employees. Nothing further had transpired beyond the Board's refusal to certify the C. I. O. as the proper bargaining agent.

CONCLUSION

The Circuit Court of Appeals has therefore failed to recognize the principles herein set forth, and to distinguish the cases herein cited from the situation in the case at bar. In doing so, the Circuit Court of Appeals has erred with respect to applicable law. The precise points involved in the case at bar have not been decided heretofore, and should be decided by the Supreme Court.

If petitioner should be barred from the review requested the result will be to allow an administrative body (the National Labor Relations Board) to arbitrarily determine an aggrieved party's right of review contrary to the express provisions of the National Labor Relations Act and contrary to the intent of the Congress.

Respectfully submitted,

R. H. Fryberger and
G. W. Townsend,
Counsel for Petitioner.

No. 512

In the Supreme Court of the United States

OCTOBER TERM, 1942

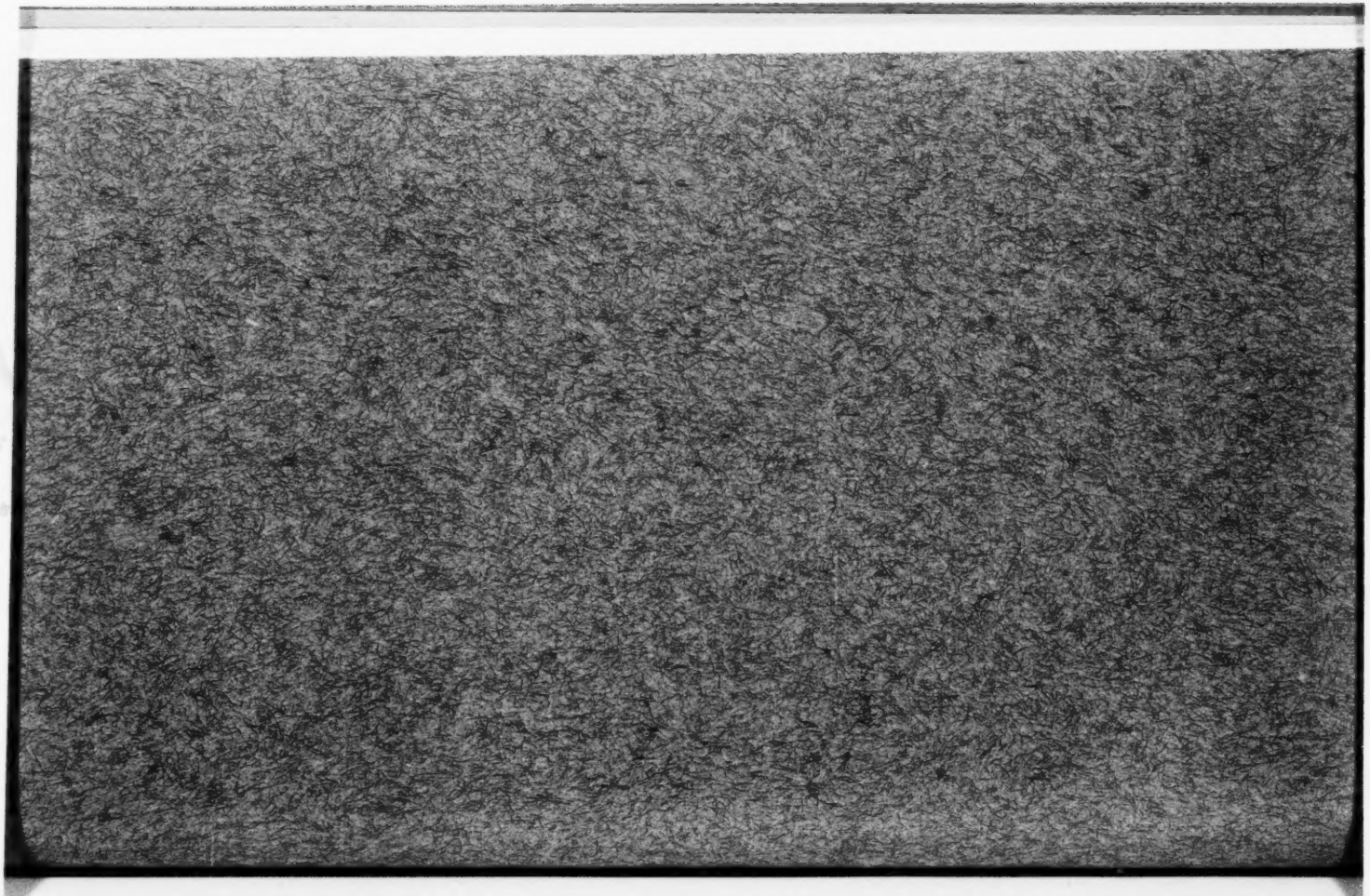
DAVID W. OLIVER, C. WILFRED OLIVER AND HOMER D. OLIVER, COPARTNERS, TRADING AS D. W. OLIVER & SONS, PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.



INDEX

CITATIONS

628478—45

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court below is reported in 145 F. (2d) 328. The Supplemental Decision and Order of the National Labor Relations Board (R. 5–8) is reported in 57 N. L. R. B. 68. The Decision and Direction of Election (R. 11–15) is reported in 52 N. L. R. B. 1421.

JURISDICTION

The judgment of the court below (R. 31) was entered on October 5, 1944. The petition for a

writ of certiorari was filed on January 4, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, upon the petition of an employer, a circuit court of appeals has jurisdiction to review an order of the Board setting aside an election conducted by it pursuant to Section 9 of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. ~~11–13~~ 9–11.

STATEMENT

Pursuant to a petition filed by Local 1139, United Electrical, Radio & Machine Workers of America, C. I. O., herein called the Union, under Section 9 of the National Labor Relations Act, the Board designated the case as No. 18–R–822, held a hearing, and directed an election to determine whether or not the employees of petitioners, within an appropriate unit, desired to be represented by the Union (R. 11–15). The Union lost the election and thereafter filed objections alleging, in substance, that petitioners had engaged in certain conduct which prevented a free choice of representatives, and requesting the Board to set aside the

election and to order a new election at an appropriate time in the future (R. 5–6, 22–26).[1]

Soon after filing the objections, the Union filed a charge in Case No. 18–C–998, alleging that petitioners had engaged in unfair labor practices in violation of Section 8 (1) of the Act (R. 30). The facts alleged in the charge were "practically identical" with the facts alleged in the objections (*ibid.*). Thereafter, on January 1, 1944, the Board issued an order directing a hearing on the objections to the election, and consolidating Case No. 18–C–998 with the representation proceeding, Case No. 18–R–822 (R. 28–29). However, on January 20, 1944, the Board issued another order severing the two proceedings (R. 29). It then conducted a hearing on the objections which had been filed in the representation proceeding and on July 5, 1944, issued its Supplemental Decision and Order, finding that petitioners had engaged in a course of conduct prior to the election which had "prevented an expression by the employees * * * of their free and uncoerced wishes as to representation," setting aside the election, and stating that a new election would be directed at an appropriate time in the future (R. 6–8).[2]

[1] The objections are incorporated in a document entitled "Protest of Election" (R. 22). Petitioners erroneously refer to the objections as charges (Pet. 3, 11).

[2] No complaint was ever issued as a result of the charge filed in Case No. 18–C–998.

On July 21, 1944, petitioners filed in the court below a petition to review and set aside the Supplemental Decision and Order (R. 1–5). On August 14, 1944, the Board filed its motion to dismiss said petition (R. 8–9), and the court below, on October 5, 1944, handed down its *per curiam* opinion (145 F. (2d) 328) and entered its judgment (R. 31) granting the Board's motion.

ARGUMENT

Petitioner's contention (Pet. 3–5) that this proceeding, in which the Board conducted a hearing on objections to the election and set aside the election, was conducted pursuant to Section 10 (b) and (c) of the National Labor Relations Act and may be reviewed by the circuit court of appeals under Section 10 (f) of the Act is without merit.

The Act gives the Board jurisdiction over two distinct types of proceedings—one covered by Section 9 and relating to a determination of collective bargaining representatives, and the other covered by Section 10 and relating to a prevention of unfair labor practices. Only under Section 10 does the Act provide for review by the circuit courts of appeals: under Section 10 (e), upon petition by the Board to enforce its orders involving unfair labor practices, and under Section 10 (f), upon petition by "any person aggrieved by a final order of the Board"

in an unfair labor practice proceeding to review such order. The Act makes no provision for review by the circuit courts of appeals of proceedings under Section 9, and it is well established that such courts have no jurisdiction to review Section 9 proceedings except where, as expressly provided in Section 9 (d), an order of the Board in an unfair labor practice proceeding "is based in whole or in part upon facts certified" in a representation proceeding. *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401; *National Labor Relations Board* v. *International Brotherhood of Electrical Workers,* 308 U. S. 413; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 458–459. As this Court stated in the latter case (at p. 459), "There can be no court review under 9 (d) until the Board issues an order and requires the employer to do something predicated upon the result of an election."

Petitioners contend (Pet. 10–11) that because the conduct alleged by the Union as the basis for setting aside the election is the same as the conduct alleged to be an unfair labor practice in the charge filed by the Union in Case No. 18–C–998, the Board, in the instant proceeding, was obliged to proceed and should be considered as having proceeded under Section 10 of the Act in conducting a hearing on the objections, and that the Board, in finding that the petitioners had engaged

in conduct which prevented an expression by the employees of their free and uncoerced wishes as to representation (R. 8), in fact found that petitioners had engaged in an unfair labor practice. This contention is fully answered by the decision of this Court in *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458–459, in which the Board, in consolidated proceedings,[3] ordered the employer to disestablish a company union and, in addition, barred that union from the ballot to be used in the election that was directed. The Board's action in striking the company union from the ballot was held non-reviewable; this despite the fact that this action was apparently based on the same facts which showed that the employer had committed an unfair labor practice by dominating the union.[4]

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[3] Section 9 (c) of the Act expressly provides that the Board, in investigating a controversy concerning representation, shall provide for an appropriate hearing "either in conjunction with a proceeding under section 10 or otherwise".

[4] See also, *Cupples Co., Mfr's* v. *National Labor Relations Board*, 106 F. (2d) 100 (C. C. A. 8), and *DuPont de Nemours & Co.* v. *National Labor Relations Board*, 116 F. (2d) 388 (C. C. A. 4), certiorari denied, 313 U. S. 571, involving consolidated representation and complaint cases in which the circuit courts of appeals set aside Board findings that certain labor organizations were dominated and supported in violation of Section 8 (2) of the Act, but because of lack of jurisdiction to review the represen-

Aside from the fact that no unfair labor practice charge was filed or a complaint issued in this proceeding, the Board made no finding that petitioners had engaged in any unfair labor practice, and consequently it could not have issued, and did not issue, any order requiring petitioners to cease and desist or take any affirmative action.[5] Even if the facts found by the Board as the basis for setting aside the election might, as a matter of law, constitute an unfair labor practice, since the Board has issued no order against petitioners requiring them to do anything as the result of such findings, petitioners are not persons "aggrieved by a final order of the Board" within the meaning of Section 10 (f) of the Act. *American Federation of Labor* and *Falk* cases, *supra*.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The case presents no question of general importance which

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tation proceedings, declined to modify the Board's Directions of Elections by requiring the Board to include such labor organizations on the ballots.

[5] Petitioner suggests that if no order has been issued, it can "ignore the Order and refuse to hold the requested election" (Br. 19–20). In the first place, a new election has not yet been directed (R. 8), and when it is, the direction is not to the employer but to the Regional Director (R. 14–15).

has not already been decided by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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FEBRUARY 1945.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce * * *.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * * The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals of the

United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. * * *

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